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767281—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 412

TURNER DAIRY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 216–217) is not reported. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 236–240) is reported at 162 F. 2d 425.

JURISDICTION

The judgment of the court below was entered on June 20, 1947 (R. 241), and a petition for rehearing was denied on August 7, 1947 (R. 242). The petition for a writ of certiorari was filed on October 24, 1947. The jurisdiction of this court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

QUESTIONS PRESENTED

(1) Whether the complaint which initiated this proceeding in the district court stated facts legally sufficient to form the basis of that court's judgment requiring the petitioner to pay the money due from it under the provisions of the milk marketing order to which it was subject.

(2) Whether the judgment entered by the district court on March 24, 1942, was conclusive as to all issues raised by the complaint or was an interlocutory judgment determining only part of these issues.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601, *et seq.*) which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31, 672, 675), as amended by the Act of August 24, 1935, 49 Stat. 750, 762, Section 8a (6) of the Agricultural Adjustment Act, as amended and reenacted, provides as follows:

> (6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order, regulation or agreement,

> heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

The order involved is Federal Order No. 41, regulating the handling of milk in the Chicago, Illinois, marketing area, originally issued on August 28, 1939, effective September 1, 1939 (4 F. R. 3764), and reissued with amendments on June 21, 1940, effective July 1, 1940 (5 F. R. 2337). The order is printed in the Record at pages 7–21, 92–113.

STATEMENT

The petitioner is a milk handler subject to Federal Order No. 41 (R. 135).[1] The milk order fixes a use value, uniform as to all handlers, for each of the classes of milk defined in the order. The price applied to Class I, or fluid milk, is the highest; the prices applied to Class II, III, or IV milk (that milk the butterfat of which is used to make cream, ice cream, butter, cheese or other products) are progessively lower (Order, Sections 941.4, 941.5; R. 13–15, 98–106). Each handler is required to report to the Market Administrator the quantity of milk used in each class during the preceding monthly delivery period. Upon the basis of these reports, the total of the use values of milk purchased by all handlers from all producers is divided by the total quantity of milk so

[1] The Act and the Order involved in this case were before this Court in *United States* v. *Ruzicka*, 329 U. S. 287 and *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110.

purchased. The result is a uniform minimum price that all handlers must pay producers. The variance among handlers in the percentage of milk used in a given class will normally mean that the use value of the milk purchased by a handler will be greater or less than the payments at the uniform price that the handler is required to make to his producers. Any handler for whom there is a plus difference is required to pay the difference into a producer-settlement fund or equalization pool, while any handler for whom there is a minus difference is entitled to withdraw the difference from the fund. In this manner all handlers are enabled to pay their producers the uniform minimum price regardless of the use to which the milk is put.

The milk order requires each handler to pay to the Market Administrator as the handler's pro rata share of the expense of administering the order not to exceed two cents per hundredweight of all milk handled during the delivery period (Section 941.9; R. 19, 110–111). Salaries and expenses of administration are paid from this fund. The order also authorizes the Market Administrator to render marketing services to producers (market information, weighing, testing, etc.), and in order to defray the cost thereof requires each handler to deduct from payments due the producers to whom the service is rendered an amount not to exceed three cents per hundredweight of all milk received (Section 941.10; R. 19–20, 111).

The Market Administrator is required to verify or check the accuracy of the handler's reports and payments by an audit of the handler's books and records (Section 941.3 (b); R. 98).

This action was instituted by the filing of a complaint and a supplemental complaint under Section 8a (6) of the Act to compel the petitioner (1) to make reports, (2) to submit its records for audit, and (3) to make payments to the producer-settlement fund, the administrative expense fund, and the marketing service fund as required by the order (R. 2–6, 90–91). Upon evidence adduced at a hearing upon respondent's motion for summary judgment, the court found that the petitioner had failed and refused to make available to the Market Administrator the books and records necessary to enable him to verify the reports that the petitioner had filed, and that the extent to which such reports were incomplete and inaccurate could not be determined until the Market Administrator was given access to the books and records (R. 125–127). On March 24, 1942, the court entered an "order" mandatorily commanding and enjoining the petitioner to comply fully with all provisions of the order with respect to the period from September 1, 1939, to June 30, 1941, and particularly to file all requisite reports for the period and to make available to the Market Administrator all books and records necessary for the verification of such reports (R. 135–136). The court expressly retained jurisdic-

tion of the cause for the purpose of entering such further order or judgment as might be necessary to afford full relief (R. 136).

The respondent on February 1, 1943, moved to have the petitioner's officers cited for contempt of the court's order of March 24, 1942, by reason of their wilful failure and refusal to file reports and to open the petitioner's books and records for audit by the Market Administrator, as required by said order (R. 136–139). Following the initiation of this contempt proceeding, the petitioner filed reports covering the period from September 1, 1939, to June 30, 1941, and the Market Administrator found, from an audit of these reports and of the petitioner's books and records, that the petitioner owed to him, with respect to this period, the sum of $24,317.76 for the producer-settlement fund, for administration expenses, and for marketing services (R. 203–204). Bills were sent to the petitioner but it failed to pay any part of the amount which had been found to be due (R. 204–205).

The respondent then filed on October 6, 1944, a motion for further relief by way of a mandatory injunction to compel the petitioner to pay to the Market Administrator the amounts found to be due under the order, and for a permanent injunction restraining future violations of the order (R. 189–193). The court found that the respondent was entitled to further relief, and entered judgment on September 28, 1945, manda-

torily commanding and enjoining the petitioner to pay to the Market Administrator the sum of $24,317.26,[2] with interest at the rate of 6 per cent per annum from the dates on which the various payments were due (R. 216–219). The Circuit Court of Appeals for the Seventh Circuit affirmed this judgment (R. 241).

ARGUMENT

I

The petitioner contends (Pet. 23) that the court below based respondent's right to relief upon the prayer of respondent's complaint rather than upon the claim which the complaint asserted. We submit that this contention is clearly erroneous. The complaint stated that it was brought "to enforce the provisions of" Milk Order No. 41 (R. 3) and it alleged that the petitioner had violated this order by refusing to make reports to the Market Administrator and to make payments to him, as required by the order, and by making incomplete and false reports (R. 4–6). The relief granted by the district court consisted of (1) an interlocutory order compelling petitioner to file the reports required by the milk order and to make its books and records available to the Market Administrator and, thereafter, (2) a judgment requiring petitioner to pay the sum of money which, after

[2] The judgment recites the amount of the obligation to be $24,317.26, although the claim is for $24,317.76.

audit of its reports, books, and records, was found to be owing to the Market Administrator. The latter relief, as well as the former, was fairly within the claims asserted in the respondent's complaint.

The court below did not make the right to require a money payment from the petitioner dependent upon the words of the prayer of the complaint, without regard to the claim asserted. The court pointed out that the complaint alleged the petitioner's refusal to make payments to the Market Administrator and that such payments were "an integral part of the scheme contemplated by" the milk marketing order, enforcement of which was sought (R. 240). The reference to the scope of the prayer for relief, in the concluding sentence of the opinion, merely emphasizes that the prayer for relief, like the allegations of the complaint, embraced the demand that the petitioner be required to pay the amounts due from it under the milk order. That an action of this kind lies under Section 8a (6) of the Agricultural Marketing Agreement Act of 1937 is established by *United States* v. *Ruzicka,* 329 U. S. 287.

The petitioner has suggested (Pet. 16, 23–25) that the decision of the court below is in conflict with *Connolly* v. *United States,* 149 F. 2d 666 (C. (C. C. A. 9) and *Downey* v. *Palmer,* 114 F. 2d 116 (C. C. A. 2). But the asserted conflict rests upon the premise, which we have shown to be unwarranted,

that the complaint in the present case did not demand that the petitioner be required to pay the amounts due from it under the provisions of the milk order. Statement of the holdings in the two cited cases makes evident the absence of any conflict with the present decision.

In the *Connolly* case the complaint sought damages for prior trespasses upon an Indian reservation and an injunction against further trespasses, but it made no reference to liability for a statutory penalty for such trespass, and the case was tried upon the basis that the statutory penalty was not in issue. The appellate court accordingly set aside judgment for the statutory penalty and otherwise affirmed the judgment. The *Downey* case was a suit to cover the unpaid balance of an assessment made against a stockholder of an insolvent national bank. The defendant pleaded a release of the claim, to which the plaintiff replied that the release had been obtained by fraud. The court held that the original claim was barred by the statute of limitations and that this claim, in the absence of any request to amend the complaint, could not be converted into a claim for damages based upon fraudulent misrepresentation.

The petitioner also suggests that the present decision is in conflict with an earlier decision by the same court, *Kansas City, St. L. & C. R. Co.* v. *Alton R. Co.*, 124 F. 2d 780 (C. C. A. 7), but the petitioner's quotation from this case (Pet.

25–26) is in entire accord with the decision in the instant case.

II

The petitioner contends (Pet. 26) that the judgment entered by the district court on March 24, 1942, was conclusive as to all issues raised by the pleadings and that the judgment was therefore a final one which the court was without power to amend or modify following expiration of the term at which the judgment was entered. But that judgment could and did determine only part of the issues raised by the complaint and the judgment was therefore interlocutory rather than final.

The court, in entering judgment, reserved jurisdiction of the cause for the purpose of entering such further orders and judgments as might be necessary to afford full relief to the parties (R. 136). The court's findings, on which that judgment was based (R. 135), show that the amount of money due from the petitioner under the milk order was not then ripe for determination. The findings expressly state that the petitioner had refused to make its books and records available to the Market Administrator and that the extent to which its reports were incomplete and inaccurate could not be determined until the Market Administrator had been given access to all of the petitioner's books and records (R. 134). Since audit of the handler's books was an essential step in ascertaining what payments were required of

him under the milk order,[3] the amount due from the petitioner was, on the date the judgment was entered, because of its own violation of the order, not capable of being determined.[4]

The petitioner asserts (Pet. 16) that the decision below is in conflict with *Woods Bros. Const. Co.* v. *Yankton County,* 54 F. 2d 304 (C. C. A. 8). But in that case the judgment which the trial court set aside after expiration of the term was admittedly a final one. The case is, therefore, not even pertinent to the issue presented here, namely, whether the judgment of March 24, 1942, was interlocutory or final.

While the district court, when it issued its final judgment, refused to grant a further injunction restraining the petitioner from handling milk in violation of the milk order, upon the ground that the petitioner had not been shown to have been guilty of any violations since 1941 (R. 217), this statement obviously refers to violations occurring subsequent to the marketing period in controversy, and does not mean that the petitioner had not, after December 1941, continued to violate the milk order by failing to perform the obligations imposed upon it with respect to the period from September 1, 1939, to June 30, 1941.

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[3] Section 941.3 (b) of the milk order requires the Market Administrator to verify the accuracy of a handler's reports by an audit of its books and records (R. 98).

[4] In fact, petitioner did not permit an audit of its books until after civil contempt proceedings against it had been commenced (R. 138–139, 238).

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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NOVEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947